NO. 83-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

GWEN L. KILLOUGH,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Has any constitutional right of a defendant been violated when a state court, as a condition of probation, orders a defendant to make restitution in an amount in excess of the amount alleged in a theft indictment, where the defendant, as part of a plea bargain process agrees, in exchange for a recommendation of probation, to make restitution in whatever amount the State can prove was stolen and the amount of restitution ordered is established by sworn testimony of an accountant based on an audit and by sworn testimony as to the defendant's contemporaneous bank deposits.

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The Opinion of the Court of Criminal Appeals, reported as Killough v. State, 434 So. 2d 849 (Ala. Cr. App. 1982), appears in the appendix to this brief.

2. The Opinion of the Supreme Court of Alabama, reported as Ex parte: Gwen L. Killough, 434 So. 2d 852 (Ala. 1983), was submitted by Petitioner in the appendix attached to her petition for a writ of certiorari.

JURISDICTION

The jurisdiction of this Court has not been invoked under the statute cited by Petitioner, 28 U.S.C. § 1557(2).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claim under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Respondent adopts the Statement of the Case as set forth in the opinion of the Alabama Court of Appeals in Killough v. State, 3 Div. No. 982 (Ala. Cr. App. Dec. 28, 1982). That part of the opinion, found on pages 1-3, is quoted:

> The indictment in this case charged that Appellant "did knowingly obtain or exert unauthorized control over $1361.94...the property of Capitol City Laundry, with the intent to deprive the said owner of the said property in violation of § 13A-8-3 of the Code of Alabama." Appellant pleaded guilty to this charge on June 5, 1981. After properly determining that the guilty plea was intelligently and voluntarily entered, the trial court adjudged Appellant to be guilty and continued the case for "sentencing and probation determination."
>
> The sentencing and probation hearing began on July 17, 1981, but was continued until July 31, 1981, when the trial judge realized the complexities involved in determining for

restitution purposes the actual amount embezzled by Appellant. At the hearings, the State presented evidence that the Appellant, acting in her capacity as bookkeeper for Capitol City Laundry, had illegally taken money paid by customers on accounts due and deposited that money in her personal bank accounts. In addition to the $1,361.94 averred in the indictment and apparently taken during 1980, the State presented evidence that Appellant similarly embezzled approximately $90,000 in years prior to 1980.

At the conclusion of the second hearing, the trial judge sentenced Appellant to five years imprisonment. He then suspended the sentence and placed appellant on probation for five years "conditioned upon [appellant's] spending twelve months in the county jail, paying court costs, paying restitution in the amount of $73,691, and any and all conditions as may be imposed by the court at a later date." Included in the total amount of restitution was $14,936 claimed as "litigation expenses."

Appellant subsequently filed a "Motion to Withdraw Guilty Plea and Enter Not Guilty Plea and Motion for a New Trial" which was granted by the trial

> judge. The State sought and was granted by this court a writ of mandamus directing the trial court to vacate its order purporting to set aside the plea of guilty because Appellant's motion was not timely filed. The Appellant now prosecutes this appeal requesting that this court "declare the judgment and sentence of the lower court to be null and void as to the amount of restitution ordered in excess of the amount alleged in the indictment which is $1,361.94" or "reverse the sentence and order a new trial."

The Alabama Court of Criminal Appeals affirmed the conviction on December 28, 1982, holding that restitution in excess of indictment amount could be imposed as a condition of probation since the Petitioner had agreed to make full restitution as part of a plea bargain agreement. An application for rehearing was filed by Petitioner and overruled on February 1, 1983.

A petition for a writ of certiorari was in the Supreme Court of Alabama which

was granted on March 25, 1983. The case was orally argued before the Alabama Supreme Court on May 9, 1983. The Alabama Supreme Court unanimously affirmed the holding of the Alabama Court of Criminal Appeals on June 10, 1983, and specifically held that "a defendant can be ordered to pay restitution in an amount in excess of the amount stated in the indictment, if the defendant made an agreement as part of a plea bargain." The Alabama Supreme Court further concluded that Petitioner "did agree to make restitution in an amount in excess of that charged in the indictment, and that the Court of Criminal Appeals was justified in holding that Killough agreed to make full restitution."

Petitioner then filed a petition for certiorari in this Honorable Court on August 8, 1983. The Respondent waived its right to file a brief in opposition

to certiorari in its letter to this Court on September 6, 1983. On October 13, 1983, Respondent was directed to file a further response.

REASONS FOR DENIAL OF THE WRIT

PURSUANT TO A PLEA BARGAIN AGREEMENT, PETITIONER AGREED TO MAKE FULL RESTITUTION IN WHATEVER AMOUNT THE STATE COULD PROVE PETITIONER STOLE, EVEN IF THE AMOUNT WAS GREATER THAN THE INDICTMENT AMOUNT, IN RETURN FOR THE STATE'S RECOMMENDATION OF PROBATION.

Petitioner raises three points in her argument to this Court: (1) that the sum which has been ordered to be paid as a condition of probation was not "acknowledged, conclusively established in a criminal proceedings (sic), or finally determined in a civil litigation"; (2) that Petitioner had no notice of the amount she was ordered to

pay; and (3) that no hearing was held to determine Petitioner's "ability to pay such a large sum." The writ of certiorari should not be granted because there is no merit to any of these three points.

First, a restitution hearing was held at which sworn testimony was presented to determine the exact amount that Petitioner embezzeled from her place of employment. Petitioner's attorney was present and was allowed to cross-examine the witnesses. The Petitioner also testified and explained to the court exactly how she stole the money in question. The court then ordered Petitioner to pay the amount which had been established that she stole. The trial court also stated that he would review the case prior to her release and determine the nature in which the amount would be paid back.

There is no truth in Petitioner's claim of inadequate notice as to the amount she could be required to pay in restitution. As is clearly shown by Appendix A of the Court of Criminal Appeals Opinion, the Petitioner agreed to pay whatever sum the State could prove that she stole in return for probation and she was on notice that the State was going to prove over the indictment amount. (See Appendix A) In fact, the State had informed Petitioner that they were alleging "some ninety thousand dollars worth of restitution in this case" prior to the taking of the plea. The amount ordered in restitution was then established by competent evidence at an evidentiary hearing.

Throughout these proceedings, Petitioner's attorney has admitted numerous times that the plea bargain agreement was that his client would make "full restitution over and above what was in the

indictment." Said attorney was asked point blank by the Alabama Supreme Court whether Petitioner had agreed to pay over the indictment amount, and he admitted that was the agreement but he just felt the final amount determined was too high. However, Petitioner's main contention was that the State had failed to give adequate disclosure of documentary evidence -not that they had violated the plea bargain agreement by proving more than the indictment amount.

Further, proof that there was proper notice is the fact that Petitioner herself knew the amount which could be proved as she was the one who took the money and deposited it into her personal bank account. Thus, Petitioner entered the plea with notice that she could be ordered to pay ninety thousand dollars in restitution when, in fact, she was only ordered to pay fifty-eight thousand. Therefore, Petitioner's claim of improper

notice must also fall.

Petitioner's final point is that there was no hearing held to determine her ability to pay the amount of restitution ordered. However, such a hearing is not required as here, Petitioner agreed to make restitution in whatever amount the State could prove. Thus, her ability to pay does not come into play, as at no point did she ever assert that she would be unable to pay the sum. As stated earlier, Petitioner took the money and thus knew the sum which she could be ordered to pay. Thus, she should have asserted her inability to pay at that point instead of agreeing to pay restitution in any amount.

Petitioner relies upon the case of Bearden v. Georgia, No. 81-6633, 51 U.S.L.W. 4616 (May 24, 1983), in this argument. However, that case has no

application to the case at hand. In Bearden, this Honorable Court held that it was error for the defendant's probation to be automatically revoked because of his failure to pay his fine without first determining whether defendant had made bona fide efforts to pay or that adequate alternative forms of punishment did not exist.

Here, such an argument is premature as there has been no revocation of her probation. Moreover, the trial court's order stated that at a later date he would determine the manner in which the money would be paid back. Thus, it may not be assumed that the trial court will automatically revoke Appellant's probation without holding a hearing to determine how it is to be made. In all probability it will be determined how much she can afford to pay each month and that amount ordered. If, however, such a

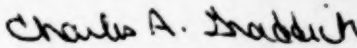
determination is not made, it is at that point that Petitioner should make this argument, not now. Thus, Petitioner's argument cannot prevail especially since Petitioner is still free on probation.

Under the federal cases relied on by the Alabama courts, Phillips v. United States, 679 F.2d (9th Cir. 1982) and United States v. McLaughlin, 512 F. Supp. 907 (D. Md. 1981), it is clear that a defendant can be ordered to pay restitution in an amount in excess of the amount stated in the indictment, if the defendant has agreed to do so as part of a plea bargain arrangment. Here, the Alabama Court of Criminal Appeals and the Alabama Supreme Court both correctly held that based upon the record and Petitioner's statements during oral argument, that such a plea bargain in fact existed. The writ of certiorari should not issue because these rulings are correct.

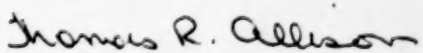
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA



/s/ Thomas R. Allison
THOMAS R. ALLISON
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

APPENDIX

December 28, 1982

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

3 Div. 482

Gwen L. Killough

v.

State

Appeal from Montgomery Circuit Court

DeCARLO, JUDGE

First degree theft; five years imprisonment.

The indictment in this case charged that Appellant "did knowingly obtain or exert unauthorized control over $1361.94 . . . the property of Capitol City Laundry, with the intent to deprive the

said owner of the said property in violation of § 13A-8-3 of the Code of Alabama." Appellant pleaded guilty to this charge on June 5, 1981. After properly determining that the guilty plea was intelligently and voluntarily entered, the trial court adjudged Appellant to be guilty and continued the case for "sentencing and probation determination."

The sentencing and probation hearing began on July 17, 1981, but was continued until July 31, 1981, when the trial judge realized the complexities involved in determining for restitution purposes the actual amount embellled by Appellant. At the hearings, the State presented evidence that the Appellant, acting in her capacity as bookkeeper for Capitol City Laundry, had illegally taken money paid by customers on accounts due and deposited that money in her personal bank

accounts. In addition to the $1,361.94 averred in the indictment and apparently taken during 1980, the State presented evidence that appellant similarly embezzled approximately $90,000 in years prior to 1980.

At the conclusion of the second hearing, the trial judge sentenced Appellant to five years imprisonment. He then suspended the sentence and placed Appellant on probation for five years "conditioned upon [appellant's] spending twelve months in the county jail, paying court costs, paying restitution in the amount of $73,691, and any and all conditions as may be imposed by the court at a later date." Included in the total amount of restitution was $14,936 claimed as "litigation expenses."

Appellant subsequently filed a "Motion to Withdraw Guilty Plea and Enter Not Guilty Plea and Motion For a New

trial" which was granted by the trial judge. The State sought and was granted by this court a writ of mandamus directing the trial court to vacate its order purporting to set aside the plea of guilty because Appellant's motion was not timely filed. The Appellant now prosecutes this appeal requesting that this court "declare the judgment and sentence of the lower court to be null and void as to the amount of restitution ordered in excess of the amount alleged in the indictment which is $1,361.94" or "reverse the sentence and order a new trial."

Our legislature has passed an act which states that its purpose is to require "all perpetrators of criminal activity or conduct. . . to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result

thereof." 1980 Ala. Acts 80-588 (codified at Ala. Code : 15-18-65 through 77 (Supp. 1982). This act did not become effective until May 28, 1980, however, and this court has held that it is not to be given retroactive application. Cox v. State, 394 So. 2d 103 (Ala. Crim. App. 1981). This statute would therefore authorize restitution only for the period between May 28, 1980, and August, 1980, when Appellant left the employ of Capitol City Laundry.

Before the passage of the 1980 act, however, the trial judge could, as a condition of probation, require an offender to "make reparation or restitution to the aggrieved party for the damage or loss caused by his offense." Ala. Code § 15-22-52(8) (1975). See also Ala. Code § 15-18-8(d)(2) (1975). Quite clearly, then, the trial judge had the authority to require Appellant to

make restitution as a condition of her probation. What we must now determine is the amount of restitution which can properly be imposed upon Appellant.

In interpreting a probation statute very similar to § 15-22-52(8), a New York court held that the words "his offense" meant "only the offense for which the defendant is on trial before the court, and cannot be stretched to cover similar offenses committed by the defendant against the same party or various parties." People v. Funk, 117 Misc. 778, 193 N.Y.S. 302 (1921). The court then limited the restitution amount to the amount specified in the indictment to which the defendant pleaded guilty. Other state courts, construing similar statutes, have reached the same conclusion. E.g. People v. Mahle, 57 Ill. 2d 279, 312 N.E. 2d 267 (1974);

State v. Eilts, 23 Wash. App. 39, 596 P. 2d 1050 (1979).

The Federal Probation Act provides that, as a condition of probation, a defendant "may be required to make restitution or reparation to aggrieved parties for actual damages on loss caused by the offense for which conviction was had." 18 U.S.C. § 3651 (1976). In construing this provision the federal courts have generally held, like the state courts above, that the restitution amount is to be limited to the amount charged in the indictment or the count of the indictment to which the defendant pleaded guilty or was convicted. Karrell v. United States, 181 F. 2d 981 (9th Cir. 1982), cert. denied, 340 U.S. 891 (1950); United States v. Follette, 32 F. Supp. 953 (E.D. Pa. 1940). Two federal courts have recently held, however, that a defendant can agree to pay a larger

amount in restitution as part of a plea bargain agreement. Phillips v. United States, 679 F.2d 192 (9th Cir. 1982); United States v. McLaughlin, 512 F. Supp. 907 (D. Md. 1981).

A review of the record in the instant case[1] leads us to conclude that a plea bargain existed in which Appellant agreed to make full restitution. It is clear that the trial judge was aware of this agreement and, in fact, had an agreement of his own with Appellant to the same effect. Because Appellant agreed to make full restitution, the trial judge could impose that as a condition of probation.[2] See Phillips v.

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[1]Portions of the record are attached to this opinion as Appendix A.

[2]We note that the full amount alleged by the State to have been embezzled by Appellant was not imposed as restitution by the trial judge.

United States, supra; United States v. McLaughlin, supra. If Appellant wishes to avoid payment of full restitution, her alternative is to serve the five-year prison sentence.

We note that the plea bargain agreement in McLaughlin, supra, was fully entered on the record along with a finding that the defendant voluntarily entered the agreement. In Phillips, supra, the plea bargain was "fully explored in open court."

Although we affirm Appellant's conviction and find that the trial court committed no error in ordering restitution in an amount exceeding that specified in the indictment, we must remand this cause for a determination of whether the $14,936 claimed as expenses was properly included as restitution. There is no clear indication in the record as to who incurred these expenses.

If these expenses were incurred by the State and amounted to investigation expenses they could not properly be included as restitution. United States v. Vaughn, 636 F. 2d 921 (4th Cir. 1980).

For the reasons stated above, the judgment of conviction by the Montgomery Circuit Court is affirmed and the cause is remanded in part for determination in accordance with this opinion.

AFFIRMED; REMANDED IN PART.

All the Judges concur

APPENDIX A.

"THE COURT: At the first hearing, not only at the first hearing but even prior to the plea, wasn't it brought to your attention that they were alleging some ninety thousand dollars worth of restitution in this case?

"MR. MCGEE: They were alleging an awful large amount of restitution, but as far as giving me disclosure of documentary evidence, the expenses, to this day, I have never received any nor has the defendant.

"THE COURT: At the conclusion of the first hearing, didn't I put the case off for two weeks. . .

"MR. MCGEE: Yes, sir, for some time --

"THE COURT: . . . And I asked you to get all of your facts together and find out what the case is all about. That they were alleging some ninety thousand dollars worth of restitution?

"MR. MCGEE: It was the thirteen hundred dollars, only, which is all we ever admitted to.

"MR. HAWTHORNE: You're talking about before the plea.

"THE COURT: No, after the plea and you said something about ninety thousand dollars worth of restitution.

"MR. HAWTHORNE: At the plea, before she took the plea, we said we are talking about ninety thousand dollars. All you have to do is look back on the record.

"THE COURT: In your fourth count you said the Court was without jurisdiction to award restitution of the sum of money in excess of that alleged in the indictment. What was your agreement with the Court?

"MR. MCGEE: That I would enter a plea of guilty, and we would have a restitution hearing.

"THE COURT: And that full restitution be made over and above what was in the indictment; is that right?

"MR. MCGEE: And full disclosure ordered.

"THE COURT: Then why wouldn't I have jurisdiction? You made that agreement, didn't you?

"MR. MCGEE: But, we didn't have full disclosure. I don't think that we had a fair hearing. I think the defense was denied their right to put on --

"THE COURT: But, based on your agreement on the plea of guilty --

"MR. MCGEE: I don't think that I can confer jurisdiction with any kind of agreement with this Court. I think only statutory law can do that.

"MR. HAWTHORNE: Why did you make the agreement?

"MR. MCGEE: It takes two.

. . .

"THE COURT: Did you ever disclose [to] them prior to the hearing, the amount of money you claimed in resitution?

"MR. HAWTHORNE: Yes, sir. we disclosed that prior to the guilty plea.

. . .

"MR. HAWTHORNE: . . . We disclosed eighty-nine to ninety thousand dollars prior to the defendant's pleading guilty, and at that time the Court said whatever the State can show and prove, then I am going to grant as far as restitution. Mr. McGee said that that was fine.

"MR. MCGEE: With the understanding I was to receive copies of the documents that you were going to use, which I have not to this day, nor has the defendant, received documents on expenses.

. . .

"THE COURT: And I recall at the beginning of the second restitution hearing you filed a motion to limit the restitution to thirteen hundred dollars, and at that time the Court gave you the alternative to back out [of] your plea, go to trial . . .

"MR. MCGEE: True.

"THE COURT: . . . or stick to the original agreement, which was to pay whatever restitution was.

"MR. MCGEE: I filed a motion because I didn't think we were sticking to the agreement because of the failure of the District Attorney's Office to disclose --

"THE COURT: But then you must have decided you were going to.

"MR. MCGEE: My client decided that, Your Honor; not about the agreement, but she didn't want to go to trial." [Emphasis added]

CERTIFICATE OF SERVICE

I, Thomas R. Allison, an Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the 9th day of November, 1983, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows: